No. 14,842

IN THE

United States Court of Appeals

For the Ninth Circuit

FISHER CONSTRUCTION COMPANY, LTD.,
Appellant,

vs.

C. W. LERCHE,
Appellee.

Appeal from the District Court of Guam,
Territory of Guam.

APPELLEE'S BRIEF.

E. R. CRAIN,
101 Aflague Building, Agana, Guam,
Attorney for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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APPELLEE'S BRIEF.

Appellee herewith supplements certain data required by this Court which appellant failed to set out in its opening brief.

ADDITIONAL JURISDICTIONAL STATEMENT.

In addition to appellant's jurisdictional statement, appellee cites paragraph one of the complaint pertaining to jurisdiction (Tr. p. 3).

ADDITIONAL STATEMENT OF CASE.

Appellee does not agree with appellant's statement of the case. Appellee entered into a two year con-

tract of employment with appellant on September 29, 1952 (Tr. p. 128). He went to work for appellant *about* the 17th of September, 1952 (Tr. p. 28) (Emphasis supplied). Appellee received a salary increase on February 1, 1954 to $200.00 per week, which increase was given because appellee was to take on additional work (Tr. pp. 14, 31-32), and the increased salary was paid to appellee from that date to the date of his discharge.

ARGUMENT.

I.

In its first specification of error appellant contends that appellee should not recover his wages for the balance of his contract from the date of his discharge. To substantiate this stand, it has quoted Justice Cardozo, from his concurring but separate opinion in *McClelland v. Climax Hosiery Mills,* 252 N.Y. 347, 358-359, 169 N.E. 605, 609, but has quoted him only in part.

Continuing his remarks:

> "Proof of a prima facie case will charge the master with a duty of going forward with the evidence. This does not mean that he has the burden of proof in the strict sense, a burden that would require him to plead the matter to be proved. (citations omitted) The statement is made not infrequently in treatise and decision that a servant wrongfully discharged is 'under a duty' to the master to reduce the damages, if he can. The phrase is accurate enough for most purposes, yet susceptible of misunderstanding if empha-

> sized too sharply. American Law Institute, Tentative Restatement of the Law of Contracts, Section 328. The servant is free to accept employment or refuse it according to his uncensored pleasure. What is meant by the supposed duty is merely this: that if he unreasonably reject, he will not be heard to say that the loss of wages from then on shall be deemed the jural consequence of the earlier discharge. He has broken the chain of causation, and loss resulting to him thereafter is suffered through his own act. It is not damage that has been caused by the wrongful act of the employer."

No such situation prevails in this case. Appellant not only failed to plead facts in mitigation of the appellee's damages; it also offered no proof. Appellant goes into considerable detail concerning matters upon which the record is silent, but upon which matters appellant was at full liberty to present evidence at trial on its own behalf. Appellee presented a *prima facie* case as to his earnings from the date of discharge to the termination date of his contract. The burden then fell upon the appellant to go forward with the evidence, if indeed it had any evidence to offer on the points.

Appellant construes the record in such a manner as to make it appear that appellee, after his discharge by appellant, made no attempt to secure other employment, and for reasons of his own, saw fit to take the employment appellant now complains of. The record does not bear out this contention (Tr. p. 33). From the record as cited above, appellee sought employment

from the 24th day of May to the 7th day of June, 1954, and obviously the trial court drew the inference from the testimony, uncontroverted, that the employment which appellee took was the only employment he was able to find after that lapse of time. Appellant's citation of the rule from 35 *Am. Jur.* 489-490 belies its contention that the facts in this case are peculiar and fall outside the rule. Condensed, the rule reads:

> "The amount of damages recoverable for an employer's breach of a contract of employment for a determinate period, by an employee who has been improperly dismissed before the expiration of the term of service * * * is to be *reduced by * * * the profits of the business in which he has engaged on his own account, realized during the term which the employment contract was to remain in force.*" (Emphasis supplied.)

The only other case relied upon by appellant is that of *Grant v. New Departure Manufacturing Company,* 85 Conn. 421, 83 Atl. 212 (1912). Appellant cites at length from a minority opinion in that case. Examination discloses that it does not follow the connotation placed upon it by appellant. Actually, Justice Wheeler found that the plaintiff is not bound to present testimony upon the point of mitigation of his damages until that point is raised by the defendant employer.

In the same case, Thayer, J., for the majority stated:

> "Nor is the defendant harmed by the finding (also complained of as having been found without

evidence), that from the time of his discharge until the end of the year the plaintiff was not able to obtain employment. The plaintiff had been paid in full to the time of his discharge. The defendant having broken the contract, the plaintiff, prima facie, was entitled to the balance of the salary stipulated to be paid * * * In the present case, * * * it was permissible for the defendant to show, either that the plaintiff had between his discharge and the end of the year found and accepted other employment, or that by proper diligence he could have found other employment. (citations omitted) The plaintiff was not bound to offer any evidence upon the question until it was opened by the defendant. The latter, having offered no evidence upon that question, he was not harmed by the finding complained of, because without such finding the plaintiff was entitled to the balance of his salary for the year."

In the instant case, the employer never raised the point.

II.

Although the agreement between the parties in this cause is dated September 29, 1952, appellant contends that the contract actually dates from the 17th day of September, 1952, and that its termination date is September 16, 1954. The trial court heard the witnesses, weighed the evidence, and in its findings of fact found that plaintiff and defendant entered into a contract on the 29th day of September, 1952, whereby

plaintiff was employed by defendant for a period of two years from the date of said contract (Tr. pp. 14, 128).

In the case of *Gladys Belle Oil Company v. Clark,* 296 Pac. 461, the court succinctly analyzes the objection raised by appellant:

> "Where parties reduce their contract to writing, all oral negotiations, statements, representations, and inducements leading up to the execution thereof, are merged therein and the rights of the parties must be determined and measured by the terms of the written instrument itself."

III.

Appellant contends that the court erred in allowing damages to appellee in the sum of $200.00 per week, rather than the sum of $175.00 as specified in the original agreement.

While an oral agreement by an employer to pay an employee a wage in excess of that called for in a written contract in itself would not be binding upon employer for want of consideration, where performance under the new agreement has taken place on both sides, the employer, in essence, would be estopped from denying the existence of the new agreement.

> "An agreement, when changed by the mutual consent of the parties, becomes a new agreement, which takes the place of the old, and consists of the new terms and as much of the old agreement as the parties have agreed shall remain

unchanged; in other words, a contract may be abrogated in part and stand as to the residue." 17 *C. J. S., Contracts,* Section 379, page 869.

In the case of *Perry v. Farmer,* 54 P. (2d) 999, a landlord over a period of time had accepted a lesser rent than that called for in the lease. While the court agreed as to the general rule that an executory oral agreement to modify a written contract would not be binding upon the landlord, the court further held:

> "There is, however, an exception to this general rule which is almost as well recognized as the rule itself. If the modifying agreement has been fully executed or partially executed on both sides, neither party can repudiate that part which has been executed on the ground that there has been no consideration therefor."

IV.

Appellant has argued three specifications of error. In essence, its entire argument is that the court failed properly to find the facts. Issue has been taken with the first part of the first finding:

> "Plaintiff and Defendant entered into a contract, on the 29th day of September, 1952, whereby Plaintiff was employed by Defendant for a period of two years from the date of said contract, * * *" (Tr. p. 14.)

and all of the fourth finding as follows:

> "That Plaintiff would have earned the total sum of Three Thousand Six Hundred Dollars

> ($3,600.00) had he been permitted to complete his contract with defendant and that from the date of his discharge to the 29th day of September, 1954, plaintiff earned a total sum of Four Hundred Dollars ($400.00)." (Tr. p. 14.)

These findings of the court are substantiated by the record. The president of defendant corporation testified that the agreement dated September 29, 1952 between Mr. Lerche and his company constituted the agreement and that he signed it. He also stated that he had hired Mr. Lerche then (Tr. p. 128). There is no controversy between the parties as to the date of discharge of appellee by appellant. Therefore, the trial court's first finding supports the further finding that appellee would have earned the total sum of $3,600.00 had he been permitted to complete his contract. The record substantiates the court's finding that at the time of the breach, appellee, by contract, was earning $200.00 per week. Appellee made a *prima facie* case as to his earnings from May 24, 1952 to September 29, 1952 (Tr. p. 33) which appellant chose not to controvert.

The rule is well settled that the findings of the trial court will not be disturbed except where it is clearly shown that there is no evidence to support them. The rule is well stated in *Palacine Oil Company v. Commercial Casualty Insurance Company,* 75 F. (2d) 20:

> "But under the evidence in the case, the question is not, as argued by Appellant, whether there is any evidence which supports the findings and judgment of the trial court, but rather whether

there is any evidence which even tends to support the contention of appellant that it was entitled to a declaration of law in its favor."

Other decisions supporting this well settled rule are:

"The controverted issues turn largely on questions of fact as to which, as the District Judge saw the witnesses, his findings carry much weight and will not be set aside unless plainly wrong." *United Kingdom Optical Company, Ltd., et al. v. American Optical Company, et al.,* 68 F. (2d) 637.

"The questions presented upon appeal are mainly questions of fact. This court may not overthrow the judgment of the trial court in its decision on questions of fact unless there is a want of evidence to support the judgment." *Boyles v. Kingsbaker Brothers Company,* 53 P. (2d) 141.

"A reviewing court is not justified in disturbing a judgment unless it appears that upon no hypothesis is there sufficient evidence to support it (citations omitted)." *Hayward Lumber and Investment Company, a corporation, Appellant v. Sam Naslund, et al., Respondents,* 13 P. (2d) 775, 125 Cal. App. 34.

CONCLUSION.

It is respectfully submitted that the court below did not err in any of the respects asserted by appellant and that its findings of fact and judgment should not be disturbed. Appellee requests that the Court

review this appeal in the light of Paragraph 2 of Rule 26 of its rules.

Dated, Agana, Guam,
December 14, 1955.

Respectfully submitted,
E. R. CRAIN,
Attorney for Appellee.